

Internal Revenue Service

memorandum

CC:TL:Br3

WEArmstrong

date: FEB 14 1990

to: District Counsel, Greensboro CC:GBO

from: Assistant Chief Counsel (Tax Litigation) CC:TL

subject: Decision document and related considerations where, after CP 2000 correspondence with and statutory notice issuance to a nonfiler, the nonfiler and spouse file a joint return.

This memorandum is in response to your November 8, 1989, memorandum requesting advice with respect to the proper content and effect of a decision document entered in a case where nonfiling spouses filed a joint return subsequent to the issuance of a statutory notice to only one of them.

ISSUES

- 1 Where nonfiling spouses filed a joint return subsequent to the issuance of a statutory notice to only one of them:
 - a. should the Tax Court decision document state what the tax liability is and reflect the amounts paid and assessed;
 - b. should the non-petitioning spouse be requested to sign a Form 870 AD; and
 - c. if the decision document reflects no deficiency, could this be raised by the non-petitioning spouse when faced with collection of the tax shown to be due by the filed return?
- 2 Where a statutory notice is issued after the filing of the delinquent joint return, because the return did not get associated with the CP 2000 correspondence, if the IRS is willing to accept the return as filed, may the decision document indicate the liability reflected on the joint return?

09267

CONCLUSION

Since it will lessen the possibilities of future problems, we agree that a decision document should reflect: (1) the deficiency before consideration of assessments and payments made after issuance of the statutory notice; (2) any assessments made based upon the joint return; (3) the amount of taxes paid or credited for the tax year involved; and (4) the deficiency to be assessed and any amount unpaid. Also, we agree that the non-petitioning spouse should be required to execute a Form 870 AD, since this will assist in the correct amount of tax being assessed and collected and tend to preclude the possibility of a refund suit by that spouse. Further, even where a decision document reflecting no current deficiency is appropriate, for the sake of completeness and clarity, it should contain a statement of the total deficiency before consideration of the joint return assessment and payment facts. If the joint return reports a tax liability larger than that determined in the statutory notice, a claim for an increased deficiency under I.R.C. § 6214(a) should be included in the stipulated decision document.

FACTS

You state that your office has encountered an increasing number of situations where a CP 2000 notice is issued to an individual nonfiler. After the statutory notice is issued, the nonfiler petitions the Tax Court and then files a joint return with his or her spouse. You state that it is unclear whether the return filed after issuance of the statutory notice is being processed. You state that sometimes the return is accepted as filed and that some appeals officers will attempt to audit the return.

You propose that if the IRS is going to accept such a joint return, the decision document should state what the tax liability is and reflect if any amount has been paid. This is because the decision of the Tax Court will probably preclude a redetermination of at least one of the spouses' liability. Additionally, you suggest that the non-petitioning spouse should be required to sign a Form 870 AD.

You express concern regarding the collection of the non-petitioning spouse's liability where the statutory notice is issued and a joint return is subsequently filed. You wonder, where a decision document is filed indicating no deficiency, whether that could be raised by the non-petitioning spouse when faced with the collection of the tax shown to be due by the filed return or in litigating the amount of the liability in a refund suit. You believe, at best, that such a decision document could cause confusion and misunderstanding.

Another factual pattern described by you is where, after initial CP 2000 correspondence to one spouse, but before the statutory notice is issued, a joint return is filed. Later, the statutory notice is issued because the return did not get associated with the CP 2000 correspondence, and a petition is filed with the Tax Court. You state that if the IRS is willing to accept the joint return as filed, it seems that the assessed joint liability is valid. However, because of the confusion which would be created by the filing of a decision document which indicates no deficiency, you propose that the decision document indicate the liability reflected on the return.

You believe the issues and concerns raised in your memorandum might be of National concern. As a result, you have requested our assistance is addressing the issues and concerns raised so that a consistent approach can be taken with respect to the matters.

DISCUSSION

We have not heard of similar problems from other offices or regions, so we will limit this response to the questions you raise. Since you state that inconsistencies exist in the treatment and processing of the joint returns by Appeals Officers, it might be that the problems can be resolved at your regional level. If not, and if other regions are experiencing similar problems, then come back to us and we will coordinate the matter at this level and possibly issue a Litigation Guideline Memorandum.

With respect to the concern that the tax determined by the Tax Court is assessed correctly, Appeals knows or should know from the information contained in the administrative file of the separate individual account established under the substitute return program for the nonfiler. Thus, where the nonfiler and his or her spouse, subsequent to the issuance of the statutory notice, file a joint return that is accepted, Appeals, after posting the tax liability determined by the Tax Court to the joint account of the petitioning nonfiler and his or her spouse, will close or remove the separate account. To assure proper posting to the joint account, the decision document should reflect:

1. the deficiency redetermined by the court;
2. the assessed and unassessed amounts; and
3. the paid and unpaid amounts.

Examples of decision documents dealing with interim assessments and payments can be found in Forms 5-1-8 thru 12 and 5-9-6 thru 9 of the Tax Litigation Form Book and Exhibits (35)(10)00-7,8, and 34 of the CCDM.

Where a delinquent joint return is filed by married nonfilers after one of the nonfilers has filed a petition with the Tax Court, and the return is correct and accepted as filed, the amount of the tax deficiency reflected in the decision document should be consistent with the amount of the tax liability reflected on the joint return. We agree that the potential for misunderstanding and future problems with regard to the collection of the tax liability is lessened where there is consistency between the amount of the tax liability reflected on the filed joint return and the amount of the deficiency set forth in the decision document. Relatedly, we believe that the non-petitioning spouse should be required to execute a Form 870 AD.

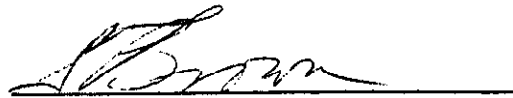
In some situations, the delinquent joint return will not reflect the same amount of tax liability as the decision document. For example, the delinquent joint return might reflect a tax liability while the decision document might reflect no deficiency. If the disparity in amount is due to an issue or issues which the Commissioner did not win and is collaterally estopped from relitigating, the non-petitioning spouse in a refund suit will be successful in having refunded any taxes paid with respect to the issues which the Commissioner is estopped from relitigating. See Graham v. Commissioner 76 T.C. 853 (1981). Because I.R.C. § 6404(a) provides that the Secretary is authorized to abate the unpaid portion of the assessment of any tax which is excessive in amount, we believe that whenever the Commissioner has knowledge that the amount assessed against the non-petitioning spouse is excessive, the Commissioner should voluntarily abate the excessive amount.

With respect to the issuance of a statutory notice because a delinquent joint return was not associated with the CP 2000 correspondence, we believe that in such a situation the transcript of account should reflect the assessment of tax liability reflected on the joint return, if the joint return was accepted as filed. Thus, if no tax was due at the time the statutory notice was issued, the Tax Court decision document need only reflect that there is no deficiency. Although we believe a decision document reflecting no tax deficiency is adequate under such circumstances, we are not adverse, for the sake of clarity, to adding to the decision document a statement to the effect that the delinquent joint return filed before issuance of the statutory notice reflected a tax liability of a certain amount.

In sum, we believe, that where a joint return is filed after the issuance of a statutory notice and one of the spouses has filed a petition with the Tax Court, the Commissioner should use all appropriate tools and procedures that will result in the correct amount of tax liability being assessed against and collected from such individuals. Further, we believe that if the addition of special language to the decision document and the execution of a Form 870 AD will lessen misunderstandings and aid in the assessment and collection of the correct tax, such tools also should be appropriately used.

MARLENE GROSS

By:



SOMMERS T. BROWN
Acting Chief, Branch 3
Tax Litigation Division